

FEDERAL CIRCUIT COURT OF AUSTRALIA

THIND v MINISTER FOR IMMIGRATION & ANOR

[2013] FCCA 1438

Catchwords:

MIGRATION – Judicial review – Migration Review Tribunal – application for visa – whether bogus document – whether jurisdictional error.

PRACTICE AND PROCEDURE – Suppression and non-publication orders – prior suppression order of another court – whether suppression order necessary to prevent prejudice to the administration of justice.

WORDS AND PHRASES – “bogus document”.

Legislation:

County Court Act 1958 (Vic), s.80(1)

Federal Circuit Court of Australia Act 1999 (Cth), Part 6A, ss.88F, 88G

Federal Court of Australia Act 1976 (Cth), Part VAA, s.50

Migration Act 1958 (Cth), ss.65(1), 97, 360(2)(b) and (3), 476

Migration Regulations 1994 (Cth), regs.1.03, 2.26, Schedule 2, cl.886.223(1) and 886.225(a), Schedule 4, Part 1, cl.4020

Cases cited:

Australian Competition and Consumer Commission v Air New Zealand Limited (No.3) [2012] FCA 1430

Batra v Minister for Immigration & Citizenship & Anor (2012) FLR 461; [2012] FMCA 544

Brar v Minister for Immigration & Citizenship [2012] FMCA 519

Herald & Weekly Times Ltd v Williams & Ors (2003) 130 FCR 435; [2003] FCAFC 217

Hogan v Australian Crime Commission & Ors (2010) 240 CLR 651; [2010] HCA 21

Lejmanoski v The University of Western Australia [2013] FMCA 75

Suh & Ors v Minister for Immigration & Citizenship & Anor (2009) 175 FCR 515; [2009] FCAFC 42

Applicant:

HARWINDER SINGH THIND

First Respondent:

MINISTER FOR IMMIGRATION &
BORDER PROTECTION

Second Respondent:

MIGRATION REVIEW TRIBUNAL

File Number: PEG 69 of 2013
Judgment of: Judge Lucev
Hearing date: 23 September 2013
Date of Last Submission: 23 September 2013
Delivered at: Perth
Delivered on: 21 October 2013

REPRESENTATION

For the Applicant: In person
Counsel for the Respondents: Mr M Smith
Solicitors for the Respondents: Sparke Helmore

ORDERS

- (1) The name of the first respondent be varied to “Minister for Immigration & Border Protection”.
- (2) That the applicant’s application be dismissed.
- (3) Pursuant to ss.88F and 88G(1)(a) of the *Federal Circuit Court of Australia Act 1999* (Cth), and so as to prevent prejudice to the administration of justice, the following documents or parts of documents:
 - (a) Letter from the Department of Immigration and Citizenship to the applicant – invitation to comment (dated 17 April 2012), located at page 84 of the Court Book;
 - (b) Decision of the delegate of the first respondent (dated 18 June 2012), located at pages 103-104 and 128-129 of the Court Book;

- (c) Letter from the applicant's representative to the Migration Review Tribunal (dated 11 March 2013), located at page 152-153 of the Court Book;
 - (d) The following paragraphs of the decision of the Migration Review Tribunal (dated 26 March 2013), located at pages 158-170 of the Court Book: [25], [20]-[31], [41]-[42], [47]-[48] and [52]-[53]; and
 - (e) The following paragraphs of the decision of the Migration Review Tribunal (dated 26 March 2013), located at Annexure A of the affidavit of the applicant affirmed on 17 April 2013: [25], [20]-[31], [41]-[42], [47]-[48] and [52]-[53],
 - (f) not be disclosed other than to the Court, the parties and their external legal representatives.
- (4)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT PERTH

PEG 69 of 2013

HARWINDER SINGH THIND

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

MIGRATION REVIEW TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Introduction

1. The applicant seeks judicial review under s.476 the *Migration Act 1958* (Cth)¹ in relation to a decision of the second respondent, the Migration Review Tribunal,² dated 26 March 2013 in which the Tribunal affirmed a decision of a delegate³ of the first respondent, then the Minister for Immigration, Multicultural Affairs and Citizenship, now the Minister for Immigration and Border Protection,⁴ not to grant the applicant a subclass 886 visa. The Minister's change of name necessitates that

¹"*Migration Act 1958*".

²"Tribunal Decision" and "Tribunal" respectively.

³"Delegate's Decision" and "Delegate" respectively.

⁴"Minister".

there be an order reflecting that change, and there will be an order made accordingly.

Background – visa requirements

2. To be granted the visa sought by the applicant, the applicant had to satisfy the requirements of cl.886.225(a) of Schedule 2 to the *Migration Regulations 1994* (Cth),⁵ which provided that the applicant is required to satisfy, relevantly, “PIC 4020”. PIC 4020 provides as follows:

(1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:

(a) the application for the visa; or

(b) a visa that the applicant held in the period of 12 months before the application was made.

(2) The Minister is satisfied that during the period:

(a) starting 3 years before the application was made; and

(b) ending when the Minister makes a decision to grant or refuse the application;

the applicant and each member of a family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).

(3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.

(4) The Minister may waive the requirements of any or all of paragraphs (1) (a) or (b) and subclause (2) if satisfied that:

(a) compelling circumstances that affect the interests of Australia; or

⁵“*Migration Regulations 1994*”.

(b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;

justify the granting of a visa.

(5) In this clause:

information that is false or misleading in a material particular means information that is:

(a) false or misleading at the time it is given; and

(b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information⁶

3. The phrase a “*bogus document*” in PIC 4020 has the same meaning as in s.97 of the *Migration Act 1958*,⁷ where “*bogus document*” is defined as:

... in relation to a person, means a document that the Minister reasonably suspects is a document that:

a) purports to have been, but was not, issued in respect of the person; or

b) is counterfeit or has been altered by a person who does not have authority to do so; or

c) was obtained because of a false or misleading statement, whether or not made knowingly.

4. In order to obtain the subclass 886 visa, the applicant was required to demonstrate that, as at the date of the Tribunal Decision, the applicant’s skills had been assessed by the relevant assessing authority as suitable for the applicant’s nominated skilled occupation.⁸

⁶ PIC 4020 is at clause 4020 in Part 1 of Schedule 4 to the *Migration Regulations 1994* (“PIC 4020”).

⁷ *Migration Regulations 1994*, reg.1.03.

⁸ *Migration Regulations 1994*, Schedule 2, cl.886.223(1).

Background – chronology – application, Delegate’s Decision and Tribunal Decision

5. On 9 August 2008, the applicant’s application for a subclass 886 visa was lodged.⁹ The applicant:
 - a) nominated his skilled occupation as “pastry cook”,¹⁰ and
 - b) provided a copy of a positive skills assessment¹¹ dated 1 April 2008 issued by the Trades Recognition Authority¹² for his nominated occupation based in part on 900 hours of work experience that he had allegedly completed.¹³
6. On 18 June 2012, the Delegate refused to grant the applicant a subclass 886 visa because the applicant had submitted information to the TRA that was false and misleading in a material particular.¹⁴ The Delegate’s Decision was based on:
 - a) investigations undertaken by the Department in relation to a work reference provided by a particular employer.¹⁵ Those investigations revealed that the applicant’s work reference had been provided by a person who had admitted “*that he manufactured references attesting to work at ... [the Cake Company] for skilled visa applicants*”;¹⁶ and
 - b) the fact that the applicant had not been able to provide any documentary evidence of his work with the Cake Company.¹⁷
7. On 6 July 2012 the applicant applied to the Tribunal for a review of the Delegate’s Decision.¹⁸ By letter dated 4 February 2013 the Tribunal invited the applicant to attend a hearing scheduled for 12 March 2013.¹⁹

⁹ Court Book (“CB”) 1.

¹⁰ CB 9.

¹¹ “Skills Assessment”.

¹² “TRA”.

¹³ CB 9 and 26-27.

¹⁴ CB 104.

¹⁵ “the Cake Company”.

¹⁶ CB 104.

¹⁷ CB 104.

¹⁸ CB 109.

¹⁹ CB 134.

On 14 February 2012 the applicant's representative acknowledged the date for the scheduled hearing and requested information from the Tribunal about the validity of the applicant's Skills Assessment.²⁰ On 11 March 2013 the applicant's lawyers informed the Tribunal that the applicant would not attend the scheduled hearing and instead "*elects to have his matter determined 'on the papers'.*"²¹

8. On 26 March 2013 the Tribunal affirmed the Delegate's Decision not to grant the applicant a subclass 886 visa.²² The Tribunal did so on the basis that there was evidence that the applicant had given the Minister a bogus document in relation to the application for the visa and, therefore, the applicant did not meet the requirements of PIC 4020(1).²³

9. The Tribunal:

- a) considered whether there was evidence the applicant had given, or caused to be given, a bogus document to the Minister, or an officer or the Tribunal or a relevant assessing authority, amongst others, and for that purpose, relevantly, had regard to s.97(c) of the *Migration Act* which provides that a document is a bogus document if the Minister reasonably suspects that it was obtained because of a false or misleading statement, whether knowingly or not;²⁴
- b) found that the applicant had nominated the skilled occupation of pastry cook, and had provided the Department with a copy of the Skills Assessment;²⁵
- c) found that the Skills Assessment was based on the applicant having completed 900 hours of relevant work experience as a pastry cook at the Cake Company;²⁶
- d) referred to information contained in the Delegate's Decision indicating that the applicant's work reference was similar to those

²⁰ CB 138.

²¹ CB 154.

²² CB 157 and 169 at para.57.

²³ CB 168-169 at paras.53-54.

²⁴ CB 166 at para.45.

²⁵ CB 166 at para.46.

²⁶ CB 166 at para.46.

manufactured by a person who had admitted to having provided fraudulent work references in relation to the Cake Company for the purposes of assisting persons to apply for permanent residency in Australia;²⁷

- e) expressly considered the applicant's written submissions as to why no weight should be given to the information concerning manufacture of fraudulent work references and why there was said to be no evidence capable of enlivening PIC 4020, namely that:
 - i) there was no direct evidence that the applicant's work reference was fraudulent or that he had provided false or misleading information;
 - ii) the documentation provided by the applicant supported his claims;
 - iii) the applicant continued to be employed as a pastry cook; and
 - iv) the TRA had not revoked the Skills Assessment;²⁸
 - v) but the Tribunal did not accept those submissions;²⁹
- f) found the applicant's very limited documentary evidence did not establish that he was employed at the Cake Company for the period claimed;³⁰
- g) did not accept that because:
 - i) the applicant was now employed as a pastry cook; and
 - ii) the TRA had not revoked the Skills Assessment,
- h) that this established that the applicant had undertaken 900 hours' work experience at the Cake Company.³¹

²⁷ CB 166 at para.47.

²⁸ CB 166-167 at paras.48-50.

²⁹ CB 166-167 at paras.49-50.

³⁰ CB 167 at para.49.

³¹ CB 167 at para.50.

- i) found that the applicant's failure to mention any details of his employment in his visa application form (or when he later completed and submitted a form providing additional information) was inconsistent with his claim to have been employed at the Cake Company for 12 months;³²
 - j) found that the applicant's claimed employment was undermined by the "*dearth of evidence*" provided by him or the Cake Company about the applicant's alleged employment at the Cake Company;³³ and
 - k) noted that the Tribunal had wished to discuss these matters with the applicant in more detail but was unable to do so as he declined to appear at the hearing.³⁴
10. The Tribunal accepted that the information regarding the individual who had admitted to having provided fraudulent work references did not directly implicate the applicant, but it was satisfied that the evidence did establish that false work references had been provided from people who had claimed to have worked 900 hours at the Cake Company. In light of this evidence, and having regard to the extremely limited supporting evidence provided by the applicant, the Tribunal did not accept that the applicant had worked 900 hours at the Cake Company, or that the work reference provided by his former employer was truthful. The Tribunal was, therefore, satisfied that the Skills Assessment which the applicant had provided to the Department was a bogus document because it was obtained on the basis of a false or misleading statement. The Tribunal, therefore, found that the applicant did not meet the requirements of PIC 4020(1), and did not do so because there was evidence that the applicant "*has given, or caused to be given, to the Minister, or an officer, a bogus document in relation to the application for the [subclass 886] visa*".³⁵
11. The Tribunal considered whether to waive the requirements of PIC 4020(1), but found that the applicant had not advanced any

³² CB 167 at para.51.

³³ CB 167 at para.51.

³⁴ CB 168 at para.52.

³⁵ CB 168 at para.53.

compassionate or compelling circumstances to justify the grant of the visa. The Tribunal, therefore:

- a) determined not to waive the requirements of PIC 4020(1); and
- b) was not satisfied that the applicant met the requirements of cl.886.225 of Schedule 2 of the *Migration Regulations 1994*.³⁶

Grounds of review

12. There are two grounds of review as set out hereunder.

Ground 1

13. Ground 1 is as follows:

1. *The Tribunal erred in concluding that Trade Recognition Australia is the relevant assessing authority for the occupation of Cook.*

Particulars

(a) There is no evidence that Trade Recognition Australia or any other person or body has been approved in writing by the Education Minister or the Employment Minister for the purpose of reg. 2.26B(1A), to be the relevant assessing authority for the occupation of Cook.

(b) The Tribunal erred in determining that instrument IMMI 11/068 for the purpose of reg. 2.26B(1), relevantly specifying Trade Recognition Australia to be the relevant assessing authority for the occupation of Cook, is valid.

(c) Without a validly approved and specified (reg. 2.26B(1) and (1A) relevant assessing authority for the occupation of Cook, cl.880.230(1) is not capable of being met by the Applicant. Thus in the circumstances, cl.880.230(1) is not applicable to this application.

Ground 2

14. Ground 2 is as follows:

³⁶CB 169 at paras.55-56.

2. *The Tribunal erred in law in finding the Applicant did not meet Public Interest Criterion (PIC) 4020(1) in Schedule 4 to the Migration Regulations 1994 (Regulations).*

Particulars

(a) The Tribunal erred in construing that information given to Trade Recognition Australia were [sic] information given to a relevant assessing authority for the purposes of determining whether the applicant [met] PIC 4020(1).

(b) The Tribunal misconstrued or misapplied the definition of “information that is false or misleading in a material particular” as defined in PIC 4020(5). Thus [the Tribunal] failed to consider, from the outset, whether that information was capable of being information that is false or misleading in a material particular, for the purposes of the applicant’s application.

Consideration of grounds of review

15. In *Batra v Minister for Immigration & Citizenship & Anor*³⁷ this Court observed that:

Even though the TRA had no power to make a skills assessment, and the purported skills assessment did not have any effect as a skills assessment, it remained a bogus document within the meaning of the Act.

*It is immaterial whether or not the skills assessment was an administrative decision, or whether or not the TRA was purportedly delegated to perform a function, or whether the skills assessment was no assessment at all. The TRA skills assessment had a physical reality as a document obtained because of false or misleading information. As such, it was a bogus document.*³⁸

16. *Batra*, together with *Brar v Minister for Immigration & Citizenship*,³⁹ are authority for the following propositions:

- a) it matters not that the skills assessment emanated from a body that may not have been authorised to act as an assessing authority; and

³⁷ (2012) FLR 461; [2012] FMCA 544 (“*Batra*”).

³⁸ *Batra* FLR at 470 per Riley FM; FMCA at paras.50-51 per Riley FM.

³⁹ [2012] FMCA 519 at para.72 per Driver FM.

- b) what matters is that the skills assessment that had been given to the Minister was “*obtained because of a false or misleading statement, whether or not made knowingly*”.⁴⁰

17. Thus, in this case, even if the TRA was not a relevant assessing authority, and even if the Skills Assessment provided by the applicant had no legal effect as a skills assessment, it still had a physical reality as a document which the Minister was entitled to reasonably suspect was a document obtained because of false or misleading information, whether or not made knowingly, in the circumstances set out in the Tribunal Decision which considered that the information provided for the purposes of the Skills Assessment might have been false both because false work references had been provided by people who had claimed to have worked 900 hours at the Cake Company, but also because there was extremely limited supporting evidence from the applicant that he had worked 900 hours at the Cake Company.
18. The Tribunal finding that the Skills Assessment was a “*bogus document*” within the meaning of s.97(c) of the *Migration Act 1958* was open to the Tribunal, and it was thus open to find that the applicant did not meet the requirements of PIC 4020(1).
19. Ground 1 of the review grounds must therefore fail.
20. In relation to ground 2 the applicant contends that the Tribunal misapplied the definition of “*information that is false or misleading in a material particular*” set out in PIC 4020(5). This ground is misconceived. The allegation that the Tribunal erred in construing that information given to the TRA was information given to a relevant assessing authority for the purposes of determining that the applicant met PIC 2040(1) is irrelevant. The “*bogus document*” found to have been provided was a document provided to the Department in relation to the application for the visa on 9 August 2008. That document was found to be bogus because the Skills Assessment provided to the Department was reasonably suspected by the Tribunal to have been obtained because of a false or misleading statement made in relation to the applicant’s work at the Cake Company. Whether or not the information was given to TRA as a relevant assessing authority is

⁴⁰*Migration Act 1958*, s.97(c).

immaterial in circumstances where the Tribunal has found that the Skills Assessment is a bogus document because it was obtained because of a false or misleading statement.⁴¹ The relevant provisions of PIC 4020(1) provide that there must be no evidence before the Minister that an applicant has given, or caused to be given, to the Minister, or other designated officers and offices, “*a bogus document or information that is false or misleading in a material particular*”. The use of the disjunctive “or” between “bogus document” and “information” sets up two discrete no-evidence categories: firstly, a bogus document, and secondly, information that is false or misleading in a material particular. This use of the disjunctive “or” makes it clear that evidence of one or the other will suffice, and it is unnecessary that there be evidence of both in order to activate the provisions of PIC 4020(1). In this case, the Tribunal relied upon the existence of a bogus document, and not information false or misleading in a material particular. The provisions of PIC 4020(5) do not therefore arise for consideration. The Tribunal did not make a finding that the applicant had provided “*information that was false or misleading in a material particular*”.⁴² Rather, the Tribunal found that the applicant had provided a “*bogus document*” (being the Skills Assessment) to the Minister, or an officer, given that such document had been obtained “*because of a false or misleading statement, whether or not made knowingly*”.⁴³

21. Ground 2 of the review grounds must therefore fail.
22. The onus was on the applicant before the Tribunal to make out his case, and to endeavour to satisfy the Tribunal that he met the criteria for the grant of a subclass 886 visa.⁴⁴ It was open to the applicant to appear at the Tribunal hearing, but the applicant chose not to. If the applicant had chosen to appear, or chosen to provide further evidence to the Tribunal, it was open to the applicant to, for example, adduce evidence about, or from the maker of, the work reference as to its veracity, or to have a person provide any other evidence of the applicant’s attendance for

⁴¹ *Batra* FLR at 470 per Riley FM; FMCA at paras.50-51 per Riley FM; *Brar* at paras.71-72 per Driver FM.

⁴² PIC 4020(1).

⁴³ *Migration Act 1958*, s.97(c).

⁴⁴ *Migration Act 1958*, s.65(1).

work experience purposes at the Cake Company. As a consequence, the Tribunal was put in a position where there was “*extremely limiting supporting evidence*” for the proposition that the applicant was employed at the Cake Company,⁴⁵ and an inability to test the applicant’s evidence “*and that must include both the applicant himself and any person called in support of the applicant’s case*” at the Tribunal hearing.⁴⁶ In the circumstances, it was open to the Tribunal to make the findings that it did in relation to the bogus document on the evidence which was before it, and to find that the applicant did not satisfy the criteria for the grant of a subclass 886 visa.⁴⁷ Grounds 1 and 2 of the review grounds also fail on this basis.

23. Finally the Court observes that as the applicant consented to the Tribunal determining the review without him appearing before the Tribunal, he was not entitled to appear before the Tribunal and there was no error in the approach adopted by the Tribunal in deciding the matter on the papers.⁴⁸

Suppression order sought

The order sought

24. At hearing the Minister also sought an order suppressing disclosure of certain documents or parts of documents. The order sought was as follows:

1. *Pursuant to s.88F of the Federal Circuit Court of Australia Act 1999 (Cth) and subject to any further order or direction of the Court, the following documents or parts of documents not be disclosed other than to*

(a) *the parties and their external legal representatives, and*

(b) *the Court:*

(i) *Letter from the Department of Immigration and Citizenship to the applicant – invitation to*

⁴⁵ CB 168 at para.53.

⁴⁶ CB 168 at para.53.

⁴⁷ *Migration Act 1958*, s.65(1)(b).

⁴⁸ *Migration Act*, ss.360(2)(b) and (3).

comment (dated 17 April 2012), located at page 84 of the Court Book.

- (ii) Decision of the delegate of the first respondent (dated 18 June 2012), located at pages 103-104 and 128-129 of the Court Book.*
- (iii) Letter from the applicant's representative to the Migration Review Tribunal (dated 11 March 2013), located at page 152-153 of the Court Book.*
- (iv) The following paragraphs of the decision of the Migration Review Tribunal (dated 26 March 2013), located at pages 158-170 of the Court Book: [25], [20]-[31], [41]-[42], [47]-[48] and [52]-[53].*
- (v) The following paragraphs of the decision of the Migration Review Tribunal (dated 26 March 2013), located at Annexure A of the affidavit of the applicant affirmed on 17 April 2013: [25], [20]-[31], [41]-[42], [47]-[48] and [52]-[53].*

County Court of Victoria order

25. The basis for seeking the suppression order is an order made by the County Court of Victoria in its Criminal Division which is in the following terms:

THE COURT ORDERS, PURSUANT TO SECTION 80(1) OF THE COUNTY COURT ACT 1958 (VIC), THAT:

- 1. Subject to paragraph 2 below, the publication of any information derived from the proceeding:*
 - (a) relating to CA's co-operation with police or other law enforcement agencies; or*
 - (b) his undertaking to give evidence in any future legal proceedings;**be prohibited until further order.*
- 2. The prohibition on publication set out in paragraph 1 above does not extend to any disclosure of information to or between any of the following persons:*

- (a) any Judge of a Court or staff of a Court;*
 - (b) any officers or employees of the Commonwealth of Australia or holders of public office of the Commonwealth of Australia;*
 - (c) CA;*
 - (d) for the purposes of making or reviewing any decision under the Migration Act 1958 (Cth) or any legal proceedings arising from any such decision or review:*
 - (i) persons for whom false documentation was, or might reasonably be suspected to have been, prepared by CA who have lodged, or might lodge, visa applications with the Department of Immigration and Citizenship;*
 - (ii) persons for whom false documentation was, or might reasonably be suspected to have been, prepared by CA whose visas have been, or might be, the subject of decisions under the Migration Act 1958 (Cth) in respect of those visas;*
 - (iii) persons who make, or have made, sponsorship or nomination applications under the Migration Act 1958 (Cth) based on or connected with false documentation that was, or might reasonably be suspected to have been, prepared by CA;*
 - (e) the legal representatives of any persons referred to in subparagraphs (b) to (d) above;*
 - (f) the registered migration agents, the authorised recipients (within the meaning of the Migration Act 1958 (Cth)) and any interpreters in respect of any persons referred to in subparagraph (d) above.*
3. *Where any information of the kind referred to in paragraph 1 above is disclosed to any of the persons referred to [in] subparagraphs 2(b) to (f) above, it shall be accompanied by a copy of this order.*
4. *The prohibition on publication set out in paragraph 1 above does not extend to any disclosure of information by employees of, or Counsel engaged by, the Office of the Commonwealth Director of Public Prosecutions, officers or employees of the Department of Immigration and*

Citizenship or State or Federal police officers where that disclosure is made in the course of conducting duties associated with the investigation and/or prosecution of offences in relation to which CA has undertaken to give evidence.⁴⁹

26. Section 80(1) of the *County Court Act 1958* (Vic) provides that:

80. (1) The judge may if he thinks fit make an order prohibiting the publication of a report of any proceedings or any part thereof in any action or matter being heard or which has been heard before him which in his opinion ought not to be published. Nothing herein contained shall prevent the publication of a report of such parts of or of the facts connected with such proceedings as are not included in the prohibition.

27. The reference to “CA” in the County Court Order is to a person who was involved in the preparation of false documents in relation to work experience at the Cake Company, and who it would appear from the terms of the County Court Order is a person who continues to inform or assist authorities in relation to possible offences arising therefrom, and whose identity the Country Court of Victoria found it was appropriate to suppress in those circumstances.

Legislative provisions

28. The application is said to be made under s.88F of the *Federal Circuit Court of Australia Act 1999* (Cth)⁵⁰ which appears in Part 6A of the *FCCA Act* and which provides as follows:

(1) The Federal Circuit Court of Australia may, by making a suppression order or non-publication order on grounds permitted by this Part, prohibit or restrict the publication or other disclosure of:

(a) information tending to reveal the identity of or otherwise concerning any party to or witness in a proceeding before the Federal Circuit Court of Australia or any person who is related to or otherwise associated with any party to or witness in a proceeding before the Federal Circuit Court of Australia; or

⁴⁹“County Court Order”.

⁵⁰“*FCCA Act*”.

(b) *information that relates to a proceeding before the Federal Circuit Court of Australia and is:*

(i) *information that comprises evidence or information about evidence; or*

(ii) *information obtained by the process of discovery; or*

(iii) *information produced under a subpoena; or*

(iv) *information lodged with or filed in the Federal Circuit Court of Australia.*

(2) *The Federal Circuit Court of Australia may make such orders as it thinks appropriate to give effect to an order under subsection (1).*

29. Section 88G of the *FCCA Act* provides as follows:

(1) *The Federal Circuit Court of Australia may make a suppression order or non-publication order on one or more of the following grounds:*

(a) *the order is necessary to prevent prejudice to the proper administration of justice;*

(b) *the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security;*

(c) *the order is necessary to protect the safety of any person;*

(d) *the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in a criminal proceeding involving an offence of a sexual nature (including an act of indecency).*

(2) *A suppression order or non-publication order must specify the ground or grounds on which the order is made.*

30. In *Lejmanoski v The University of Western Australia*⁵¹ this Court set out all of the relevant provisions of the *FCCA Act* (then the *Federal Magistrates Act 1999* (Cth)), the relevant second reading speeches and explanatory memorandum, and referred to two cases, namely,

⁵¹ [2013] FMCA 75 (“*Lejmanoski*”).

Australian Competition and Consumer Commission v Air New Zealand Ltd (No. 3)⁵² and *Hogan v Australian Crime Commission & Ors.*⁵³ *Air New Zealand* was the first occasion on which the Federal Court had considered the provisions of the new Part VAA of the *Federal Court of Australia Act 1976* (Cth),⁵⁴ being the equivalent of Part 6A of the *FCCA Act* in which s.88F of the *FCCA Act* appears. In *Lejmanoski* this Court observed that on the basis of *Air New Zealand* the High Court's judgment in *Hogan* still represented the applicable law.⁵⁵ In *Hogan*, the High Court, in dealing with s.50 of the *FC Act* (now repealed as part of the amendments introducing the new Part VAA of the *FC Act*) said as follows:

30 As it appears in s 50, "necessary" is a strong word. Hence the point made by Bowen CJ in *Australian Broadcasting Commission v Parish*, that the collocation of necessity to prevent prejudice to the administration of justice and necessity to prevent prejudice to the security of the Commonwealth "suggests Parliament was not dealing with trivialities". Further, as indicated earlier in these reasons: (a) s 50 is an example of a provision authorising the Federal Court to make orders for the exercise of its jurisdiction other than in open court as mandated by s 17(1); and (b) "the administration of justice" spoken of in s 50 is that involved in the exercise by the Federal Court of the judicial power of the Commonwealth; this is a more specific discipline than broader notions of the public interest.

31 It is insufficient that the making or continuation of an order under s 50 appears to the Federal Court to be convenient, reasonable or sensible, or to serve some notion of the public interest, still less that, as the result of some "balancing exercise", the order appears to have one or more of those characteristics.

32 If it appears to the Federal Court, on the one hand, to be necessary to make a particular order forbidding or restricting the publication of particular evidence or the name of a party or witness, in order to prevent either species of prejudice identified in s 50, or, on the other hand, that that necessity no longer supports the continuation of such an order, then the power of the Federal Court under s 50 is enlivened. The appearance of the

⁵² [2012] FCA 1430 ("*Air New Zealand*").

⁵³ (2010) 240 CLR 651; [2010] HCA 21 ("*Hogan*").

⁵⁴ "*FC Act*".

⁵⁵ *Lejmanoski* at para.26 per Lucev FM. See also *Air New Zealand* at paras.19-21 per Perram J.

requisite necessity (or supervening cessation of it) having been demonstrated, the Court is to implement its conclusion by making or vacating the order. The expression in s 50 " may ... make such order" is to be understood in this sense.

33 It may tend to distract attention from the particular terms of s 50 to describe the Federal Court as embarking upon the exercise of a " discretion" when entertaining an application under s 50. Once the Court has reached the requisite stage of satisfaction, it would be a misreading of s 50 to treat it as empowering the Court nevertheless to refuse to make the order, or to leave in operation the now impugned order. It would, for example, be an odd construction of s 50 which supported the refusal of an order under s 50 notwithstanding that it appeared to the Court to be necessary to make an order to prevent prejudice to the security of the Commonwealth.⁵⁶

31. This Court is bound by the judgments in *Hogan* and *Air New Zealand* which relate to equivalent federal legislative provisions to those in Part 6A of the *FCCA Act*.⁵⁷
32. The question in this case is whether an order is necessary to prevent prejudice to the administration of justice. This is a case in respect of which there are obviously ongoing investigations by authorities into the conduct of those associated with the Cake Company. In order to prevent prejudice to such investigations the County Court of Victoria made the County Court Order set out above.⁵⁸
33. In *Herald & Weekly Times Ltd v Williams & Ors*⁵⁹ the Full Court of the Federal Court observed as follows:

A different situation might arise, for example, if the embarrassment or damage that publicity might occasion is such that it would prevent or deter a person from prosecuting or defending a proceeding in the court, or " if there was a real risk

⁵⁶*Hogan* CLR at 664 per French CJ, Gummow, Hayne, Heydon and Kiefel JJ; HCA at paras.30-33 per French CJ, Gummow, Hayne, Heydon and Kiefel JJ.

⁵⁷*Suh & Ors v Minister for Immigration & Citizenship & Anor* (2009) 175 FCR 515 at 522 per Spender, Buchanan and Perram JJ; [2009] FCAFC 42 at para.29 per Spender, Buchanan and Perram JJ.

⁵⁸ See para.25 above.

⁵⁹ (2003) 130 FCR 435; [2003] FCAFC 217 ("*Williams*").

as opposed to a remote possibility that this would occur": see Johnston v Cameron (2002) 124 FCR 160 at 180.⁶⁰

34. In the Court's view the proper administration of justice is likely to be prejudiced if details of the informant's co-operation with authorities in relation to the creation of bogus documents to assist visa applicants is made public. The evident purpose of the County Court Order was to prevent that happening, presumably so as to facilitate further investigations in relation to further offences. In the Court's view it is necessary to make a suppression order under ss.88F and 88G(1)(a) of the *FCCA Act* in terms like those sought by the Minister so as to ensure that the administration of justice is not prejudiced by the disclosure of the identity of the informant, or the nature of any assistance that the informant has specifically been giving to relevant authorities. For that reason alone the Court is of the view that the suppression order largely as sought is necessary. It can also be justified, in the Court's view, on the basis of comity between Commonwealth and State courts, but it is unnecessary to deal further with that issue in light of the preceding conclusion.
35. For the above reasons, there will be a suppression order largely in the terms sought by the Minister.

Conclusion and orders sought

36. The Court has concluded that:
- a) the name of the Minister ought to be changed to the Minister for Immigration & Border Protection";
 - b) the applicant has not established that the Tribunal Decision was affected by jurisdictional error; and
 - c) a suppression order largely in the terms sought by the Minister should be granted.
37. The Court will make orders to the following effect:

⁶⁰*Williams* FCR at 444-445 per Merkel J; FCAFC at para.36 per Merkel J (with whom Finn and Stone JJ agreed).

- a) pursuant to ss.88F and 88G(1)(a) of the *FCCA Act*, that the documents or parts of documents as set out in the Minister's proposed suppression order not be disclosed other than to:
 - i) the parties and their external legal representatives, and
 - ii) the Court;
- b) the name of the first respondent be changed to: "Minister for Immigration & Border Protection"; and
- c) the application be dismissed.

38. The Court will hear the parties as to costs.

I certify that the preceding 38Error! Style not defined.Error! Style not defined.thirty-eight (38) paragraphs are a true copy of the reasons for judgment of Judge Lucev

Associate:

Date: 21 October 2013